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COURT OF APPEALS  
DIVISION II OF THE STATE OF WASHINGTON  
STATE OF WASHINGTON  
DEPUTY

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STEVEN P. KOZOL, LARRY A. BALLESTEROS,  
KEITH CRAIG, and KEITH BLAIR,

Appellants,

v.

JPAY, INC.,  
a foreign corporation,

Respondent.

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REPLY BRIEF OF APPELLANTS LARRY A. BALLESTEROS,  
KEITH CRAIG, AND KEITH BLAIR

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ORIGINAL

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## I. SUMMARY OF ARGUMENT

In responding to the issues raised in Appellants' opening briefs, JPay to no surprise does little to address the specific legal merits of Appellants' arguments. Instead, JPay elected to generally disparage the Appellants' character, and cast bald aspersions upon their need to rely upon litigation to obtain a remedy.<sup>1</sup> JPay's ad hominem attacks included characterizing this case as "a gross abuse of the justice system," as a "scam to make money," as not being "a legitimate claim," and that this case is "frivolous" and "all based on Appellants' maniacal speculation." Sadly, JPay's briefing proves that disparagement of one's opponent is a well-worn tactic when there is no truth to one's side, and harkens to the old legal adage that "if the evidence is on your side argue the evidence, if the law is on your side argue the law, and if neither is on your side then bang your fist."

JPay endeavors to overshadow the merits of Appellants' issues by boldly telling an introductory narrative replete with glowing laudation of its efforts and practices. But let there be no mistake, the entirety of JPay's conjured image is derived one-hundred percent from a single self-serving declaration that is not even admissible for purposes of summary judgment. As

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<sup>1</sup> JPay goes to the peculiar length to take umbrage with Appellants' separate briefs, and the thoroughness of case citations. Brief of Respondent, at 13-14. But separate briefs are permitted under RAP 10.1(g), and all aspects of the briefs comply with the requirements of RAP 10.3(a) and RAP 10.4(b). JPay's protestations are unnecessary and appear ill-motivated.

the record makes clear, each and every specific sentence that JPay now espouses to portray its purportedly helpful efforts is solely gleaned from the Declaration of Shari Beth Katz. Compare Brief of Respondent, at 1-6, with Katz Declaration (CP 84-88). In fact, JPay's entire basis for its summary judgment motion was attained via cut-and-paste of the various sentences directly from the Katz Declaration. Compare Motion for Summary Judgment (CP 90-96), with Katz Declaration (CP 84-88).

As made abundantly clear in Appellants' opening briefs, Shari Beth Katz failed to establish by any actual facts that she had first-hand personal knowledge about any of the issues material to Appellants' JP3 music players becoming "locked" and converted to "Property of JPay." See Opening Brief of Appellant Ballesteros, Craig and Blair, at 32-38. Simply because Ms. Katz is plucked from the employee ranks to testify to an assemblage of purported "facts" on behalf of JPay does not rise to meet the requirement that a declarant on summary judgment must have actual, direct, personal knowledge about what he or she is attesting to.

It is well-settled law -- especially in a situation such as this, where the Plaintiffs/Appellants have been prevented from conducting any meaningful discovery into the veracity of Ms. Katz's declared statements -- that the mere fact that an employee issues a self-serving declaration is "deemed sufficient to require the credibility of his/her testimony to be submitted

to the jury as a question of fact." Sartor v. Ark. Natural Gas Corp., 321 U.S. 620, 88 L.Ed.2d 967, 64 S.Ct. 724 (1994).

Washington courts firmly embrace this principle and have held where material facts averred in an affidavit are particularly within the knowledge of the moving party, summary judgment should be denied. Gingrich v. Unigard Sec. Ins. Co., 57 Wn.App. 424, 788 P.2d 1096 (1990); Hulse v. Driver, 11 Wn.App. 509, 524 P.2d 255 (1974).

As now revealed, JPay's motion for summary judgment was based upon nothing more than speculation and unfounded assertions by the lone declarant Shari Beth Katz. As a matter of law, the very fact that the lack of foundation necessitates analysis of whether her declared facts can be true serves to defeat summary judgment, as trial courts and appellate courts do not weigh facts on summary judgment. At all rates, JPay's glowing self-reporting is all based upon the inadmissible declaration of Ms. Katz.

However, what is well established is that JPay frequently utilizes predatory, deceitful and unfair business practices. CP 180-195. JPay casts a rosey hue upon its deplorable track record by asserting on appeal that the various news publications and extensive investigation(s) into JPay misconduct that were presented on summary judgment by Appellants is somehow inaccurate or false. But if this were the case, surely JPay would have taken legal action against these alleged defamers and libelers on these news sites. In fact, a two-part news article shows

in one instance that as soon as JPay was exposed for wrongfully asserting exclusive ownership rights over inmates' personal e-mail communications, JPay rushed to make the media aware that the company had changed its practices tout de suite. CP 180-182. Apparently these news articles submitted by Appellants are beyond reproach, as years later they remain posted on news sites, unopposed.

As the height of hypocrisy, JPay attempts to distract from the merits of Appellants' issues by mudslinging depictions of them as money-scammers that litigate with no respect for the law. But not only have the Appellants gone to great lengths to educate themselves on the law so as to be able to respectfully advocate for their rights before the courts, but JPay itself has signed a contract with Washington State expressly agreeing that it "shall comply with all federal, state and local laws" (CP 427), yet then proceeds to make sizable profits by illegally providing pornographic materials (including photos of naked children) to Washington DOC inmates in the Sex Offender Treatment Program in direct violation of DOC policy, state and federal law, and which jeopardizes public safety.<sup>2</sup> ER 201. As evinced by JPay's actions in this case, its corporate mindset is that Washington law does not apply to its profit schemes.

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<sup>2</sup> See "Prison Dilemma: When Profits Undermine Safety" as published by The Crime Report, the nation's leading news source for criminal justice issues. <http://thecrimereport.org/2016/06/29/prison-dilemma-when-profits-undermine-safety/>

Belying JPay's appellate lamentation of prisoner-profiteering suits, the record is clear that Appellants did not want to have to resort to litigation, and in fact made every effort possible to obtain a simple remedy from JPay. Mr. Kozol immediately sent an initial help ticket to JPay on May 11, 2015, but JPay did not answer. CP 269-271 (¶5). Upon being ignored by JPay, Mr. Kozol sent via Certified U.S. Mail a demand letter to JPay requesting a remedy. CP 442-446. JPay never responded. Mr. Kozol sent another letter to JPay seeking to return his JP3 player so JPay could unlock it or otherwise remedy the problem. CP 212. JPay failed to respond. Mr. Kozol then sent yet another help ticket on June 10, 2015 (now after a full 30 days of being deprived of his chattel) asking JPay to unlock his player or provide another remedy. JPay flatly refused, and told Mr. Kozol he would have to purchase a new player if he wanted to "keep all of [his] music." CP 436. Twelve days later, still without use of his chattel, Mr. Kozol sent another help ticket giving notice that he would be serving a lawsuit upon JPay, and still JPay offered no remedy, and told Mr. Kozol he would have to purchase additional JPay product. CP 438. Despite their similar exhaustive efforts, Appellants Ballesteros, Craig and Blair fared no better. CP 313-318, 217.

One thing is certain to any reasonable jurist viewing these facts: either the dictionary definition of "unfair" and "deceptive" has been silently rewritten, or JPay's arguments are far beyond

mere flapdoodle and now rise to false representations. Appellants' assiduous efforts in seeking a simple non-judicial remedy are not the hallmarks of what JPay now opines to be "a gross abuse of the justice system" and "a scam for money." The record is clear that Appellants' help tickets expressly state that litigation would be avoided if JPay fixed the problem. CP 313-315.

The record is undisputed that it was only after being served with this lawsuit on June 29, 2015 (CP 588) that JPay finally circled the wagons and began offering its also-discontinued and poorly-functioning JP4 model players to Appellants as a remedy on July 10, 2015. CP 440. It is absurd for JPay to assert that Appellants' claims in this case are frivolous, when the last resort of initiating litigation was the only thing that caused JPay to finally begin offering any type of remedy whatsoever. Fortunately, the legislature intended for Washington citizens to have the powerful tool of being afforded a private cause of action under the Consumer Protection Act, chapter 19.86 RCW. This case embodies that legislative intent in action.

None of JPay's claims of this being a "frivolous" case or "a scam for money" were the basis for the trial court granting summary judgment. Verbatim Report of Proceedings (RP), 1-49. De novo review will show not even a scintilla of such intent. Instead, these bombastic arguments from JPay appear to be aimed at venting frustration from its disdain for the fact that its aggrieved customers are standing up for their rights under the

law and are seeking redress for their injuries caused by JPay's action. As the United States Supreme Court established long before the invention of digital music players and song downloads, "every right, when withheld, must have a remedy, and every injury its proper redress." Marbury v. Madison, 1 Cranch 137 (1803).

In sum, this appeal is about two different positions. One, taken by Appellants, is based upon evidence and controlling legal authorities, and the other, taken by JPay, is based upon mere speculation and an absence of legal authorities, and just resorting to name calling. JPay asserts that it did not make a false statement to the Appellants when it told them nothing could be done to unlock, service, or refurbish their JP3 devices, and told Appellants they would have to purchase a new player if they wanted to "keep all of [their] music." CP 436. Yet JPay's action of offering various remedies after being served with the lawsuit shows its earlier representations were clearly false statements made in commerce, with an intent to deceive and acquire additional profits.

JPay asserts it was an accidental glitch from a software update for a different model JP4 device that "locked" Appellants' JP3 devices. But the sole piece of evidence to support its argument is a declaration from an employee that fails to establish any basis for personal knowledge as to what actually caused Appellants' JP3 devices to become "locked" and "Property of JPay." Importantly, the Brief of Respondent makes no argument that Ms. Katz's

declaration is properly based upon first-hand personal knowledge to be admissible. And lest it be forgotten, it is undisputed that the evidence shows the only procedure for installing a "software update" for a different model JP4 device requires the inmate user to intentionally initiate a multi-step process to install the software update. CP 170. See Opening Brief of Appellants Ballesteros, Craig and Blair, at 34-35. JPay filed no competent evidence whatsoever proving beyond a genuine issue of fact that a software update for a JP4 can and did cause Appellants' JP3 players to become "locked." In fact, JPay filed no admissible evidence to establish that a software update could happen "inadvertently", or how.

JPay asserts that its refusal to relinquish its digital control and dominion over Appellants' chattel does not amount to conversion or trespass to chattels. Yet JPay avoids explaining how a conversion or trespass claim is not actionable when its software caused Appellants' JP3 players to become "locked," "Property of JPay," and even told Mr. Kozol that he no longer owned the music player that he purchased with his hard-earned money. CP 26-34. Nor is JPay's conversion or trespass to Appellants' chattel somehow ameliorated because it eventually offered a remedy after being sued.

Appellants carefully laid forth the issues on appeal in their opening briefs. In response, JPay mostly avoided the substantive issues and chose to resort to ad hominem attacks and retelling its self-serving narrative of beneficence in customer service.

For reasons known only to JPay, it failed to cite to a single case citation in its brief to address the merits of issues raised by Appellants. JPay largely chose to stand pat on its position and essentially is heard to argue "we are right - Appellants are wrong...(refer to our trial court pleadings)." As such, Appellants now proceed to only briefly underscore the bases for this appeal to be granted.

## II. REPLY ARGUMENT AND LEGAL AUTHORITY

### A. This Case Is Not About A Product Warranty

JPay has continually attempted to recast Appellants' claims as "warranty" and "user agreement" issues, claiming expired warranties on Appellants' JP3 devices render the Consumer Protection and tort claims to be without merit. Brief of Respondent, at 1-2, 15. To the contrary, as a matter of law it is irrelevant the expiration of a product warranty at the time JPay made its deceptive and unfair statements in commerce to Appellants and committed conversion or trespass upon Appellants' chattel.

JPay ensnares itself in its own inconsistent statements, as on one hand it asserts that "[w]ith no warranty in place, JPay had no obligation to replair or replace Appellants' JP3s." Brief of Respondent, at 2. Then, on the other hand, JPay states it "offered any offender with a malfunctioning JP3 a free upgrade to a newer model player regardless of warranty status." Id., at 8 (emphasis added). This shows JPay's argument to be pure doublespeak.

It makes no sense for JPay to argue Appellants' claims are precluded by an expired warranty while at the same time admitting others were offered a remedy of a new device free of charge regardless of warranty status. JPay's words actually support Appellants' argument as their CPA claims are based upon the undisputed fact that JPay lied to them to force them to purchase new JPay products. JPay now concedes that it was only after Appellants filed suit that JPay began overlooking warranty expirations and providing free player upgrades. JPay's warranty argument is specious, and makes about as much sense as trying to cure cancer by killing the patient.

Also, Appellants have never claimed that their JP3 devices are defective or broken to implicate a warranty issue.<sup>3</sup> Appellants claimed that their JP3s are fully functional except for the fact that a yet-to-be-determined software command from JPay "locked" their JP3s and made them "Property of JPay." JPay even conceded the players were otherwise functioning.

It is undisputed that JPay, as the creator, designer, and manufacturer of the JP3 and the customizer of its software, has always been able to simply "unlock" JP3 players exactly like Appellants' JP3 with just a few clicks of a computer mouse, and

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<sup>3</sup> While it may appear confusing based upon JPay's use of the term "malfunctioned" to describe Appellants' JP3s, this word is JPay's corporate terminology for deactivating and unassigning a JP3 or other model device. CP 167, 217. In this case, "malfunction" is not indicative of a typical product wear and tear issue in the usual sense. Appellants' JP3s did not malfunction, but were deactivated, administratively "locked" and "unassigned."

has even given DOC prison staff the ability to "unlock" these "locked" JP3 devices. CP 327-330, 572.

It is absurd for JPay to assert, or imply, that it no longer has the ability to install a few lines of software commands to an otherwise fully-functioning but "locked" JP3 player, and that it cannot unlock them. At a minimum, Appellants' request to ship their JP3s back to JPay for "unlocking" or "refurbishing" should have been agreed to if JPay truly was the all-helpful, great purveyor of customer service as it attempts to portray. CP 212.

Appellants' claims have nothing to do with product warranty issues. Instead, their claims are based upon action taken by JPay of its computer code "locking" their JP3s and making them "Property of JPay." It is unproven whether these software issued were inadvertent or intentional, so summary judgment was improper as to this issue dealing with Appellants' CPA claims.

Contrary to JPay's position, Appellants do not assert JPay must "forever" service its JP3s, or provide a "lifetime warranty." But because JPay's actions of software interference occurred outside of any warranty period, JPay is -- independent of a warranty -- liable for these actions and must provide the requested remedy of "unlocking" Appellants' JP3. Due to poor quality and design many JP3s were defective. Luckily, Appellants' JP3s were not defective, and because they took great care to not subject the devices to harsh wear and tear, the JP3s functioned for years beyond the warranty. Upon JPay "unlocking" Appellants' JP3s that are

in the custody of their attorney, Appellants do not plan on even attempting to sync their JP3s with the JPay kiosk any further. They simply want to enjoy their purchased chattel for the remainder of its product life, as it suits their specific needs unique to the prison environment. Appellants are lucky their JP3s were not defective, and they are entitled to use their chattel without interference from JPay. Warranty issues are immaterial here.

#### **B. U.C.C. or Breach of Contract Claims Are Not At Issue**

Per Civil Rule 11, Appellants did not file claims under the U.C.C. or for breach of contract, because they believe such claims are inapplicable. JPay's repeated attempts to recast Appellants' claims under the U.C.C. or breach of contract have no place in this appeal. Brief of Respondent, at 12. Reference to such claims not pleaded in the complaints is wholly immaterial.

Moreover, the existence of a statutory remedy does not preclude a common law tort action. See Becker v. Cmty. Health Sys. Inc., 184 Wn.2d 252, 359 P.3d 746 (2015)(common law tort action not precluded by existence of a non-exclusive remedy, regardless of the adequacy of the remedy). As such, Appellants' tort claims are neither precluded nor subsumed by their CPA claims, nor by any availability of other claims JPay asserts to be available remedies.

#### **C. Consumer Protection Act Violations**

JPay argues it did not know it was making false representations in responding to Appellants' help tickets, because

"JPay did not know the cause of Appellants' JP3 problems when Appellants were advised to purchase new model players." Brief of Respondent, at 4. JPay claims that "[i]n July 2015, JPay determined that new software designed for JP4 [models] was causing many of the JP3 malfunctions." Id. JPay proclaims that "[b]ased on the revelation that new software was likely the cause of problems with JP3s," it began offering free player upgrades. Id. But in truth, JPay's argument is nothing but a canard.

If this were in fact true, it lends incredulity to JPay's initial summary judgment position where it stated "[c]learly, it is reasonable to infer that Mr. Kozol's JP3 player simply malfunctioned because it was not made to last forever." CP 465. If JPay actually had a so-called "revelation" that an inadvertent software update likely caused the JP3s to become "locked," then it was disingenuous, if not a violation of Civil Rule 11, for JPay to later assert -- after the "revelation" -- on summary judgment that Mr. Kozol's JP3 problem was likely due to "normal wear and tear." CP 465.

But what ultimately exposes JPay's assertion as a sham is the undisputed fact that from the very beginning Appellants notified JPay that it was a software issue that caused these problems. In fact, this is presented in virtually every help ticket and the demand letter(s) submitted by Appellants. JPay now implies that it ignored these repeated notices from Appellants, but states that simply upon seeing sheer numbers of other JP3s becoming locked,

JPay in some unidentified technical manner identified it was a "software update" issue that accidentally caused these problems; all of which is, of course, now established to be based on the inadmissible Katz Declaration. This whole line of argument offends reason.

JPay's false and deceptive acts towards Appellants are beyond repudiation. JPay refused Appellants' repeated requests to have their JP3s "unlocked." Instead, JPay told Appellants that nothing could be done -- no service, no unlocking, no replacement, no refurbishing to their JP3s -- and expressly tried to repeatedly force them to purchase new devices, which was declared as the only way to "keep all of [their] music." CP 436. JPay made these representations time and time again. CP 313-318.

As a result of filing this lawsuit, all of these statements from JPay have now been proven false. JPay could all along still replace JP3s, as proven by the fact that it still had JP3s in inventory ("Supplies of old JP3 players are very limited"). CP 87. At any time JPay could have serviced/repaired/refurbished Appellants' JP3s ("JPay has refurbished five JP3 players and is in the process of delivering those players to [the Appellants]"). CP 87. And it is undisputed that JPay can "unlock" inmates' JP3s that are "locked" and "Unassigned - Property of JPay." CP 327-330. JPay can even enable DOC prison staff to "unlock" a locked JP3 as identified in the JP3 Instruction Manual. CP 572. The crux of this issue is simple: JPay wants to do everything but "unlock"

Appellants' JP3s, because to do so would concede that it made numerous deceptive and unfair statements and tried to force Appellants to purchase new devices (for profit or operational convenience reasons).

JPay argues, "there is no reason why JPay would single out the Appellants if JPay were repairing other offenders' JP3s. Appellants' conspiracy theories are in their heads." Brief of Respondent, at 5. But this is an artificial comparison. Appellants do not argue they were singled out over other inmates, rather the facts show that JPay has always been able to "unlock" JP3s that are "locked" and JPay lied to Appellants and tried to force more purchases. Again, the fact that JPay began offering replacements after being sued does not equate to Appellants arguing they were singled out. In fact, just the opposite: the lawsuit caused JPay to offer remedies to limit its exposure from other potential plaintiffs.

JPay's ability to issue a simple computer command to "unlock" Appellants' JP3 players (even if the JP3s were returned to JPay for this) has not somehow vanished over time. The reason JPay wants to avoid "unlocking" these devices is because doing so would be the ultimate admission of its violations of the Consumer Protection Act and of its tortfeasance. JPay violated the CPA in making false statements and attempting to get Appellants to buy more JPay product. These fish did not bite.

#### D. Injury Under the Consumer Protection Act

It is undisputed that something on the JPay kiosk caused Appellants' JP3s to become locked and administratively deactivated. It is undisputed this software "locking" of the JP3s caused Appellants to be unable to listen to their music purchases, view e-mail photos, play purchased videogames, or even listen to the F.M. radio. It is undisputed that JPay notified Mr. Kozol that he no longer owned his JP3 device. CP 26-34. It is undisputed that Appellants lost the ability to use thousands of dollars worth of their purchased music because the JP3s became "locked." It is clear that JPay made false statements and attempted to force Appellants to buy newer devices. Appellants have established the injury element of their CPA claims.

JPay has failed in its brief to cite to a single appellate decision that holds such a loss of use and value of personal property does not constitute an injury under the Consumer Protection Act. Conversely, Appellants cite to both appellate and statutory authority establishing these losses constitute an injury, especially when viewing the CPA liberally in favor of the consumer. Appellants also explained how a defendant cannot vitiate a plaintiff's injury element of a CPA claim by finally producing a remedy after the lawsuit is brought. Opening Brief of Appellants Ballesteros, Craig, and Blair, at 23-29. JPay fails to address these issues.

#### E. JPay Failed to Establish Beyond Genuine Issue of Fact What Actually "locked" Appellants' JP3 Devices

As established in Appellants' opening briefing, JPay's lone

declaration evidence is insufficient for summary judgment purposes. Opening Brief of Appellants Ballesteros, Craig, and Blair, at 31-34. Appellants' briefing also made clear that, at a minimum, JPay has the ability to intentionally lock and deactivate its customers' devices by implementing a "malfunction" procedure. Id., at 34-37. Only discovery into these issues will establish what actually happened in this case.

In response, JPay now concedes twice in its brief that the cause of Appellants' devices becoming "locked" is unknown, stating that "new software was the likely issue for malfunction," and that "software incompatibility is the likely cause of Appellants' JP3 malfunctions." Brief of Respondent, at 8, 20 (emphasis added).

The word "likely" is defined under the plain dictionary definition as "seeming as if it would happen or might happen." Webster's New College Dictionary (2007 ed.). But more importantly, by JPay's own position declarant Shari Beth Katz is not a competent witness on JP3 or JP4 software issues, because according to JPay:

"the JP3, which is an electronic device that runs on software that can be updated via the internet, is not the type of product that can be analyzed by a lay person. Only a person with specialized knowledge and training in specific electronics and software can analyze malfunctions associated with the JP3."

CP 486. Viewing all facts most favorably to Appellants, there is no evidence to establish Ms. Katz is an expert on software or JP3 design as required by Evidence Rule 702. As a non-expert witness she cannot testify about opinions as to "technical or specialized knowledge" regarding software or JP3 devices. Evidence

Rule 701(c). To use the words of JPay, Ms. Katz's declaration contains "unreliable guesses and nothing more." CP 486.

Summary judgment is only proper if there is no genuine dispute of material fact. Ellis v. City of Seattle, 142 Wn.2d 450, 458, 13 P.3d 1065 (2000). JPay concedes its lone declaration evidence only shows what "likely" happened. This is insufficient for summary judgment. JPay had the burden of proving no genuine issue exists. Hudesman v. Foley, 73 Wn.2d 880, 441 P.2d 532 (1968). It failed to do so, and therefore summary judgment was improper as to Appellants' CPA claims.

#### **F. Conversion and Trespass to Chattels**

One in possession of personal property is entitled to be free of illegal or improper interference in his enjoyment of the chattel. When one's personal property is intentionally interfered with, trespass to chattels and conversion are available causes of action. Conversion is the exercise of dominion or ownership over the personal property of another. In contrast, trespass to chattels is something less than a conversion. It is intentional interference with the possession or physical condition of personal property in the possession of another without justification. Vol.16 Washington Practice, Tort Law & Practice, chpt. 14, §14.15 (citing Restatement (Second) of Torts, (1965), §217).

Wrongful intent is not a necessary element of conversion, and good faith cannot be shown as a defense to conversion. Brown ex rel. Richards v. Brown, 157 Wn.App. 803, 239 P.3d 601 (2010) (trial court erred in dismissing claim for conversion where evidence

raised triable issue as to whether defendant wrongfully retained money received); In re Marriage of Langham and Kolde, 153 Wn.2d 553, 106 P.3d 212 (2005)(husband's claim of good faith was irrelevant). "The only intent required is simply the intent to exercise dominion over the plaintiff's property." Washington Practice, Tort Law & Practice, chpt. 14, pg 935.

"Conversion can occur in a number of ways. These include wrongfully detaining chattels by refusing to return them to the rightful owner (Restatement, §§ 237-241), destroying or altering a chattel (id. § 226), wrongfully taking a chattel from another (id. §§ 221 and 222), or wrongfully transferring another's chattel to someone (id. §§ 234 and 235)."

Washington Practice, at 936.

Washington courts find intent when a defendant acted with a purpose to achieve the results of his act or where he or she believed that the consequences were substantially certain to result. Bradley v. Am. Smelting & Ref. Co., 104 Wn.2d 677, 683, 709 P.2d 782 (1985). Here, there is no question JPay acted with intent to not relinquish its digital dominion or control over Appellants' chattel.

Viewing all facts in the light most favorable to Appellants, it is undisputed that some form of JPay software activity "locked" Appellants' JP3 players, rendered them "Property of JPay," which interfered with Appellants use and ownership of the chattel. It is undisputed JPay told Mr. Kozol he no longer owned the JP3 device he purchased with his hard-earned money. It is undisputed that JPay repeatedly refused to "unlock" or otherwise relinquish the digital dominion or control over Appellants' chattel.

Common to all intentional torts is the requirement that the defendant commit a voluntary act and that the harm suffered by the plaintiff be the result of the defendant's intentional conduct. Restatement, § 8A & cmt. b; Prosser and Keenan on the Law of Torts (5th ed. 1984), §§ 8, 31. In this case, Appellants repeatedly notified JPay that some sort of software issue "locked" their music players which interfered with the functionality. JPay voluntarily chose to repeatedly refuse to take any steps to restore Appellants' ability to use their chattel. JPay now attempts to feign impuissance by issuing the false narrative that "JPay did not know" its software caused these problems, and that after it reached this "revelation" it provided a remedy. Brief of Respondent, at 4. This is a mendacious tautology.

JPay's self-serving assertion is belied by the simple fact that Appellants expressly notified JPay at the very start that kiosk software issues caused the harm to their chattel. The fact that JPay chose to ignore this and refused to relinquish digital dominion and control does not insulate JPay from the torts of conversion or trespass to chattels. Seen for what it is, JPay's argument is nothing more than a lame-duck, post hoc gurgle.

JPay is liable for either conversion or trespass to chattels. The trial court erred in granting summary judgment of these claims. See Demalash v. Ross Stores, Inc., 105 Wn.App. 508, 20 P.3d 447 (2001)(trial court erroneously dismissed patron's claim for conversion on summary judgment; 16-day delay in return of coat created jury question of whether conversion had occurred); Westview

Invest. Ltd. v. U.S. Bank Nat'l Ass'n, 133 Wn.App. 835, 138 P.3d 638 (2006)(trial court erroneously dismissed conversion claim where question of fact was for jury).

**G. Appellant's Injuries Continue**

Pursuant to RAP 10.1(g), Appellants Ballesteros, Craig and Blair hereby incorporate and adopt the arguments presented in Section II(G) of the Reply Brief of Appellant Kozol.

**H. Damages Under the Consumer Protection Act**

Pursuant to RAP 10.1(g), Appellants Ballesteros, Craig and Blair hereby incorporate and adopt the arguments presented in Section II(H) of the Reply Brief of Appellant Kozol.

**I. Damages Under Intentional Torts**

Pursuant to RAP 10.1(g), Appellants Ballesteros, Craig and Blair hereby incorporate and adopt the arguments presented in Section II(I) of the Reply Brief of Appellant Kozol.

**J. Declaratory Judgment (UDJA) Claims**

Pursuant to RAP 10.1(g), Appellants Ballesteros, Craig and Blair hereby incorporate and adopt the arguments presented in Section II(J) of the Reply Brief of Appellant Kozol.

**K. Motion for CR 56(f) Continuance**

Pursuant to RAP 10.1(g), Appellants Ballesteros, Craig and Blair hereby incorporate and adopt the arguments presented in Section II(K) of the Reply Brief of Appellant Kozol.

L. Motion to Compel Discovery

Pursuant to RAP 10.1(g), Appellants Ballesteros, Craig and Blair hereby incorporate and adopt the arguments presented in Section II(L) of the Reply Brief of Appellant Kozol.

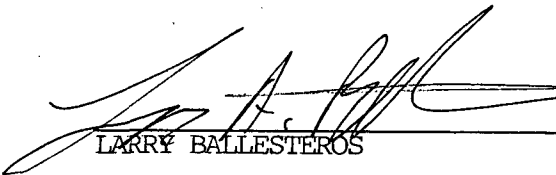
M. Costs on Appeal

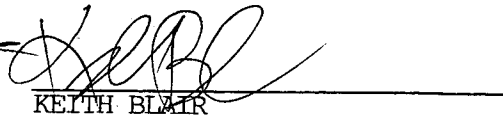
Pursuant to RAP 10.1(g), Appellants Ballesteros, Craig and Blair hereby incorporate and adopt the arguments presented in Section II(M) of the Reply Brief of Appellant Kozol.

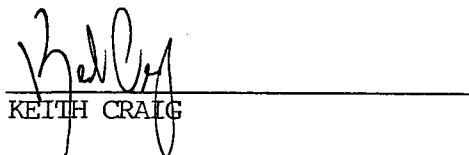
III. CONCLUSION

For the foregoing reasons Appellants respectfully request that this appeal be granted, and ask that the Court vacate the order granting summary judgment, and the orders denying the motion for CR 56(f) continuance, and motion to compel; and ask the Court to remand the case with instructions to grant the motion for CR 56(f) continuance and motion to compel.

RESPECTFULLY submitted this 16<sup>th</sup> day of January, 2017.

  
LARRY BALLESTEROS

  
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DECLARATION OF SERVICE BY MAIL

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I, LARRY A. BALLESTEROS, declare and say

That on the 16<sup>th</sup> day of January, 2017, I deposited the following documents in the Stafford Creek Correction Center Legal Mail system, by First Class Mail pre-paid postage, under cause No. 48888-4-II:

Reply Brief of Appellants Ballesteros, Craig and Blair

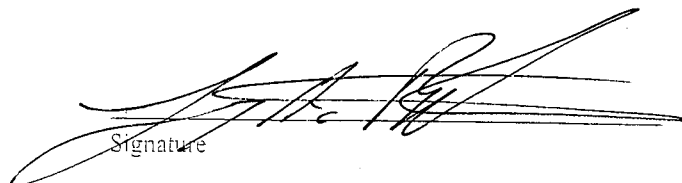
addressed to the following:

Clerk of the Court  
Court of Appeals - Division II  
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Tacoma, WA 98402

John A. Kesler III  
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Peternell, PLLC  
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Olympia, WA 98502

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED THIS 16<sup>th</sup> day of January, 2017, in the City of Aberdeen, County of Grays Harbor, State of Washington.

  
Signature

Larry A. Ballesteros

Print Name

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